U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 14 2007

SRC 06 237 52139

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a civil and structural engineering firm. It seeks to employ the beneficiary permanently in the United States as an environmental engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, while we are satisfied that the petitioner, a personal service corporation, has demonstrated its ability to pay the proffered wage in 2005, the petitioner has not submitted any financial documentation regarding its ability to pay the proffered wage in 2006.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on November 12, 2003. The proffered wage as stated on the Form ETA 750 is $96,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of January 2003.

On the petition, the petitioner claimed to have an establishment date in 1962, a gross annual income of $2.3 million, a net income of $2.2 million and 16 employees. In support of the petition, the petitioner submitted its Internal Revenue Service Forms 1120, U.S. Corporation Income Tax Returns, for 2003, 2004 and 2005.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on September 6, 2006, the director requested additional evidence pertinent to that ability, specifically the beneficiary's

Forms W-2, Wage and Tax Statements, for 2003, 2004 and 2005 and evidence of wages paid to the beneficiary in 2006.

In response, the petitioner advised that the beneficiary began working for a different employer in September 2005 and intended to return to the petitioner upon approval of the instant petition. The petitioner submitted the beneficiary's Forms W-2 reflecting wages paid of $96,678.47 in 2003, $93,372.88 in 2004 and $46,866.66 in 2005. The petitioner also submitted evidence of the beneficiary's wages with another employer in 2006, but these wages do not reflect on the petitioner's ability to pay the proffered wage during that year.

In the notice of denial, the director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage in 2005 or 2006. On appeal, counsel asserts that the director failed to take into account distributions made to the petitioner's officers. The petitioner submits a letter from its Chief Executive Officer (CEO) attesting to funds available for distribution, including in 2006. The petitioner, however, does not submit any financial documentation relating to 2006.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has demonstrated that it paid the proffered wage in 2003 only. The difference between the proffered wage and the wages paid was $2,627.12 in 2004 and $49,133.34 in 2005. The petitioner did not pay the beneficiary any wages in 2006.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had

available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The tax returns reflect the following information for the following relevant years:

	2004	2005
Gross Income *	$1,972.909	$2,298,123
Net income *	$18,207	$13,507
Compensation of officers *	$550,239	$610,153
Comp. of majority owner ‡	$178,002	$225,134
Current Assets †	$96,118	$166,104
Current Liabilities †	$91,095	$163,958
Net current assets	$5,023	$2,146

* From Form 1120, page 1
‡ From Schedule E
† From Schedule L

The petitioner has not demonstrated that it paid the full proffered wage in 2004, 2005 or in any month in 2006. In 2004, however, as noted by the director, the petitioner's net income of $18,207 more than covers the difference between the proffered wage and the wages paid, $2,627.12.

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

In 2005, however, the petitioner shows a net income of only $13,507 and net current assets of only $2,126. The petitioner has not, therefore, demonstrated the ability to pay the difference between the wage paid and the proffered wage, $49,133.34, out of its net income or net current assets. The director ended his inquiry at this point.

On appeal, counsel asserts for the first time that the director should have considered the petitioner's status as a personal service corporation. Typically, money expended by a company, including on wages, are no longer available to pay the proffered wage. Moreover, a corporation is a separate and distinct legal entity from its owners or stockholders. *See Matter of Tessel*, 17 I&N Dec. 631, 633 (Act. Assoc. Comm. 1981); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530, 531 (Comm. 1980); *Matter of M-*, 8 I&N Dec. 24, 50 (BIA 1958; A.G. 1958). CIS will not consider the financial resources of individuals or entities who have no legal obligation to pay the wage. *See Sitar Restaurant v. Ashcroft,* 2003 WL 22203713, *3 (D. Mass. Sept. 18, 2003). Thus, the assets of the petitioner's shareholders are typically not relevant.

Nevertheless, the petitioner has presented a plausible argument, fully consistent with the evidence, to demonstrate that peculiarities in the tax code create a unique circumstance for personal service corporations, as designated on the IRS Form 1120.

As in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the CIS may, at its discretion, consider evidence relevant to a petitioner's financial ability that falls outside of a petitioner's net income and net current assets. CIS may consider such factors as the number of years that the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that CIS deems to be relevant to the petitioner's ability to pay the proffered wage.

In the present matter, the petitioner has identified itself on IRS Form 1120 as a "personal service corporation." Pursuant to *Matter of Sonegawa*, *supra*, the petitioner's "personal service corporation" status is a relevant factor to be considered in determining its ability to pay. A "personal service corporation" is a corporation where the "employee-owners" are engaged in the performance of personal services. The Internal Revenue Code (IRC) defines "personal services" as services performed in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts, and consulting. 26 U.S.C. § 448(d)(2). As a corporation, the personal service corporation files an IRS Form 1120 and pays tax on its profits as a corporate entity. However, under the IRC, a qualified personal service corporation is not allowed to use the graduated tax rates for other C-corporations. Instead, the flat tax rate is the highest marginal rate, which is currently 35 percent. 26 U.S.C. § 11(b)(2). Because of the high 35% flat tax on the corporation's taxable income, personal service corporations generally try to distribute all profits in the form of wages to the employee-shareholders. In turn, the employee-shareholders pay personal taxes on their wages and thereby avoid double taxation. This in effect can reduce the negative impact of the flat 35% tax rate. Upon consideration, because the tax code holds personal service corporations to the highest corporate tax rate to encourage the distribution of corporate income to the employee-owners and

because the owners have the flexibility to adjust their income on an annual basis, the AAO will recognize the petitioner's personal service corporation status as a relevant factor to be considered in determining its ability to pay.

As in the present case, substantially all of the stock of a personal service corporation is held by its employees, retired employees, or their estates. The documentation presented here indicates that [redacted] owns 62 percent of the company's stock. According to the petitioner's IRS Form 1120 Schedules E (Compensation of Officers), [redacted] elected to pay himself $225,134 in 2005. In addition, [redacted] who owns an additional 35 percent of the company's stock, received compensation of $168,719.

CIS (legacy INS) has long held that it may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. at 50, *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. at 531, and *Matter of Tessel*, 17 I&N Dec. at 633. Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

In the present case, however, counsel is not suggesting that CIS examine the personal assets of the shareholders, but, rather, the financial flexibility that the employee-owners have in setting their salary based on the profitability of their personal service corporation medical practice. Clearly, the petitioning entity is a profitable enterprise for its owner. As previously noted, their firm earned a gross profit of $2,298,123 in 2005. A review of the petitioner's gross profit and the amount of compensation paid out to the employee-owners confirms that the job offer is realistic and that the proffered salary of $96,000 could be have been paid by the petitioner in 2005.

While the petitioner has overcome the director's finding that the petitioner did not have the ability to pay the proffered wage in 2005, the director also concluded that the petitioner had not demonstrated its ability to pay the proffered wage in 2006. On appeal, the petitioner submitted a letter from its Certified Public Accountant (CPA), [redacted] and a letter from CEO [redacted] does not discuss the petitioner's finances in 2006. [redacted] asserts that the petitioner's 2006 revenues through October were $1,825,000 and its expenses during the same period were $1,455,000, leaving "Pre-Distribution Income" of $370,000. While the petitioner's 2006 income tax return would not have been available in November 2006 when the appeal was filed, the petitioner did not submit audited financial statements or annual reports as required by the regulation at 8 C.F.R. § 204.5(g)(2). While this regulation also permits the submission of a letter from the petitioner's financial officer where the petitioner employs more than 100 employees, the petitioner in this matter has never claimed to employ 100 employees. Thus, the letter from [redacted] is insufficient. Finally, the petitioner did not submit the alternative evidence permitted "in appropriate cases," such as profit/loss statements, bank account records or personnel records. 8 C.F.R. § 204.5(g)(2). As the petitioner has not submitted the required evidence regarding its finances for 2006, we cannot evaluate whether the petitioner had the ability to pay the proffered wage in that year.

The regulation at 8 C.F.R. § 204.5(g)(2) expressly states that the petitioner must demonstrate its ability to pay the proffered wage as of the priority date "and continuing until the beneficiary obtains lawful permanent residence." The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2006. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.